In the District Court of the United States for the Western District of Louisiana, Shreveport Division

UNITED STATES OF AMERICA, PLAINTIFF

v.

COTTON VALLEY OPERATORS COMMITTEE, ET AL., DEFENDANTS

STATEMENT AS TO JURISDICTION

In compliance with Rule 12, as amended, of the Supreme Court of the United States, the United States of America submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the district court entered in this case on September 20, 1949. A petition for appeal is presented to the district court herewith, to-wit on November 16, 1949.

JURISDICTION

The jurisdiction of the Supreme Court to review by direct appeal the judgment entered in this cause is conferred by Section 2 of the Expediting Act of February 11, 1903 (32 Stat. 823), as amended by Section 17 of the Act of June 25, 1948 (62 Stat. 869; 15 U. S. C. 29).

867408—49——1

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *United States* v. *Yellow Cab Company,* 332 U. S. 218; *International Salt Company* v. *United States,* 332 U. S. 392.

STATUTE INVOLVED

Section 161 of the Revised Statutes (5 U. S. C. 22) provides as follows:

> The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it.

THE ISSUES AND THE RULING BELOW

This is an equity suit brought by the United States on June 17, 1947 in the Federal District Court for the Western District of Louisiana against the Cotton Valley Operators Committee, an unincorporated association, and a number of corporations and individuals, all members of that committee, and all of whom are owners of the right to search for and produce oil, gas or other hydrocarbons in the Cotton Valley Field, Webster Parish, Louisiana. The complaint was brought under Section 4 of the Sherman Act (Act of July 2, 1890, 22 Stat. 209) charging defendants with engaging in a combination and

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conspiracy to restrain interstate commerce in the hydrocarbons taken from the Cotton Valley Field, in violation of Sections 1 and 2 of that Act; it prayed that the court cancel certain allegedly illegal agreements entered into by the defendants, and enjoin the defendants from engaging in other activities pursuant to this conspiracy.

Prior to the filing of the complaint, and since it has been filed, agents of the Federal Bureau of Investigation, pursuant to a request from the Antitrust Division, made an investigation of the facts relevant to possible violation of law by the defendants. In the course of this investigation, the agents made file searches of the defendants' files and interviewed officers and employees of the defendants as well as other persons. The agents did not obtain any signed written statements from any of the witnesses but reduced the results of their investigations to writing in the form of reports to the Attorney General.

Prior to the filing of the complaint the Attorney General had certain correspondence with various persons not parties to the action relative to the subject matter of the complaint. This correspondence was in the nature of information supplied by complainants.

Defendants moved for discovery under Rule 34 of the Federal Rules of Civil Procedure to require the Attorney General to produce "all reports * * * made by agents of the Federal Bureau of Investigation * * * during the

period * * * from February 1, 1946 to the date of institution of this action * * *" and "all letters, telegrams, and other communications, * * * together with copies of replies thereto, received by the Department of Justice * * * during the period from August 1, 1945 to the date of institution of this action from private individuals, corporations or associations * * *" relating to the questioned activities of defendants. A supporting affidavit of the secretary of defendant association was filed, stating that refusal to disclose this information "will materially hamper and delay defendants in their preparation for trial, will deprive them of materials required for the cross-examination of witnesses * * * and will unfairly operate to their prejudice."

The Government opposed the motion for discovery[1] and filed affidavits of the Attorney General, asserting that the documents were privileged and that it is exclusively within the authority of

[1] Issue was joined on this motion. The actual sequence of pleadings was this: Defendants' motion for production of documents was denied on April 21, 1948. Defendants moved to vacate the denial, and, on March 11, 1949, the court vacated the denial and granted the motion. On May 10, 1949, the Government moved to vacate the order of March 11, 1949. The Government's motion was denied on June 16, 1949, with additional time allowed for argument in the event the Government refused to produce the documents. Following further hearings, the complaint was dismissed on September 20, 1949, for the failure of the Government to comply with the order to produce.

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the Attorney General to determine whether such documents are privileged. The Government also offered to make available to defendants all documents obtained from any of them, all documents obtained from others which are intended to be used as evidence, and a list of all proposed witnesses.

Following submission of briefs and oral argument, the court ruled that the Government should submit the documents to the court, for its determination as to which, if any, were privileged, and which should be furnished to defendants. The Government refused to comply with this directive, whereupon the court entered an order dismissing the complaint on September 20, 1949.

THE QUESTIONS ARE SUBSTANTIAL

The extent of the privilege from court process of documents deemed by the executive branch of the Government to be confidential for reasons of public policy, has posed a substantial problem at least since Attorney General Lincoln appeared before the court in *Marbury* v. *Madison* and raised the claim of privilege with respect to certain facts relating to the commission issued Marbury by President Adams. The court indicated that if the Attorney General thought that any fact was communicated to him in confidence, he was not bound to disclose it (1 Cranch 137, 144), and, in the opinion, made the classic statement of the independence of the executive in political and dis-

cretionary matters (1 Cranch 164). Chief Justice Marshall, when sitting on Burr's trial, issued a subpoena to President Jefferson for the production of a letter sent by General Wilkinson to the President, which Burr affirmed contained information vital to his defense. Jefferson ignored the subpoena and directed the United States Attorney to produce only such portions of the letter as he deemed not to be confidential (David Robertson, Burr's Trials (1808) Volume 1, pages 177, 180, 186–188; Dillon, Marshall: *Life, Character, Judicial Services,* Volume 1, introduction pages 46–49; Ford, *Writings of Thomas Jefferson,* Volume 9, pages 55–57, 62).

Congressional recognition of the executive privilege is reflected in Section 161 of the Revised Statutes (5 U. S. C. 22), which provides that the head of each department is authorized to prescribe regulations governing the custody and use of records and paper appertaining to it. Department of Justice Order No. 2239, May 2, 1939 (11 F. R. 177A–107, Section 51.71) states that all official documents, files and records, including Federal Bureau of Investigation reports, are confidential, and forbids disclosure except by permission of the Attorney General. Such regulations have been held valid and binding by this court in connection with the attempt to obtain the production of Government documents in an action brought by a State against a private party. *Boske* v. *Comingore,* 177 U. S. 459; and see

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Ex parte Sackett (C. C. A. 9, 1935) 74 F. 2d 922.

Further, in the enforcement of criminal and regulatory statutes, the identity of, and the nature of communications from, persons who are complainants or informers are absolutely privileged by settled public policy. Effective administration of the antitrust laws requires the protection of private persons who perform their duty by aiding in enforcement. *Vogel* v. *Gruaz,* 110 U. S. 311, 314–16; *In re Quarles and Butler,* 158 U. S. 532, 535–36.

Since all antitrust investigations are now conducted by the Federal Bureau of Investigation and since much relevant and helpful information comes to the Department in the form of complaining and informing letters, the judgment of the district court in this case would, if permitted to stand, seriously interefere with the enforcement of the antitrust laws. But the problem is even broader; it concerns the entire Government in a wide variety of types and stages of litigation.[2]

[2] Related problems have arisen in various forms. The Court of Appeals for the Second Circuit has ruled that in criminal prosecutions brought by the United States the privilege will not be recognized, whether based on executive discretion or informant's immunity, if the documents are essential to the defense. The procedure followed is to submit the documents to the trial court for its determination whether they should be made available to the defendant. If that court denies defendant access, and its order is appealed, the documents are placed under seal and made part of the record on appeal. In effect, this rule shifts the determination of

The district court's order exceeded the limits of discovery authorized by the Federal Rules of Civil Procedure. Defendants' motion is a formalized dragnet, supported by an affidavit in most general terms. It aims to lay bare the entire work file of opposing counsel, without specific limitation or identification of the documents sought. In this instance, the motion encompasses reports and documents comprising mental impressions and evaluations, as well as correspondence of varying degrees of relevancy elicited on the assurance of being kept confidential. These documents are an integral part of the preparation of litigation by the Department of Justice as the Government's lawyer; indeed, this investigative work in antitrust cases has been undertaken by the Federal Bureau of Investigation only for

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whether the privilege is to be exercised from the executive to the court. *United States* v. *Andolschek*, 142 F. 2d 503 (C. A. 2); *United States* v. *Krulewitch*, 145 F. 2d 76 (C. A. 2), reversed on other grounds, 336 U. S. 440; *United States* v. *Beekman*, 155 F. 2d 580 (C. A. 2); *United States* v. *Grayson*, 166 F. 2d 863 (C. A. 2); and see *United States* v. *Cohen*, 145 F. 2d 82 (C. A. 2); *United States* v. *Ebeling*, 146 F. 2d 254 (C. A. 2). In other circuits, and in various types and stages of litigation, the privilege has been both honored, *Pacific-Atlantic S. S. Co.* v. *United States*, 175 F. 2d 632 (C. A. 4); *Ex Parte Sackett*, *supra*; *United States* v. *Kohler Co.*, 13 Fed. Rules Serv. 33.333 (E. D. Pa.); *United States* v. *Haugen*, 58 F. Supp. 436 (E. D. Wash.), affirmed, 153 F. 2d 850 (C. A. 9), and denied, *United States* v. *Coplon*, (D. D. C. 1949; Criminal No. 381–49); *U. S. ex rel. Touhy* v. *Ragen* (N. D. Ill., 1949, No. 48C448) (*Ex parte McSwain*), now on appeal to the Court of Appeals for the Seventh Circuit.

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the last few years, and was formerly conducted by the Antitrust Division itself. The district court's order clearly encroaches on the work product and necessary privacy of attorneys in preparation of litigation. *Hickman* v. *Taylor*, 329 U. S. 495.

We believe that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted.

(S) PHILIP B. PERLMAN,
Solicitor General.

NOVEMBER 7, 1949.

In the United States District Court for the Western District of Louisiana, Shreveport Division

Civil Action No. 2209

UNITED STATES OF AMERICA *vs.* COTTON VALLEY OPERATORS COMMITTEE, THE OHIO OIL COMPANY, ET AL.

On November 7, 1947, the Ohio Oil Company, one of the defendants in this case, filed a motion to require plaintiff to produce for inspection, certain documents, including reports of the Federal Bureau of Investigation, correspondence, etc., with various persons, all as stated in said motion, which is made part hereof. Similar motions were filed by the other defendants. The Court, having recalled and quashed certain sub-

poenas duces tecum, obtained ex parte by the Magnolia Petroleum Company, another defendant, for reasons stated in the written opinion of January 2, 1948, its attention was called to the fact that it had not passed upon the said motion of The Ohio Oil Company. Being of the impression that the latter was, in all material respects, similar to the motion to produce and subpoenas duces tecum previously disposed of on said January 2, 1948, the said motion of The Ohio Oil Company, was, on April 21, 1948, denied in a memorandum opinion filed April 22, and as appears from a written order to that effect filed June 1, 1948.

Counsel for other defendants had filed similar motions to produce and, at the several hearings, appeared and joined in the contentions of The Ohio Oil Company.

Thereafter, on August 26, 1948, the said The Ohio Oil Company filed a motion to vacate the said order of April 21, 1948, which had denied its motion to produce and this was argued and submitted on September 17, 1948. Subsequently, the matter was, on February 21, 1949, reset for hearing on March 11, 1949, at which time, having heard further arguments, it was ordered that the Government produce the documents requested by The Ohio Oil Company "with the right to submit to the Court for ruling any documents they desired to claim to be privileged."

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On May 10, 1949, plaintiff filed a motion to vacate said order of March 11, 1949, and on June 15, following, it was heard and defendants declined to accept the Government's offer of partial compliance by filing an abstract of factual information contained in the reports of the Federal Bureau of Investigation, and the Court indicated its purpose to adhere to the ruling requiring the Government to produce the documents. At this time counsel for the Government requested time to contact the Attorney General, before the Court finally ruled on the said motion to vacate, which was granted, and on the following day, June 16, 1949, when the hearing was resumed and the Court denied the said motion to vacate, counsel for the Government was given additional time to consult with the Attorney General as to whether the Court's order to produce would be complied with, and the question of what was to be done in case of refusal was reset for July 7, 1949.

On the last mentioned date, counsel for the Government appeared and submitted further authorities as to the right of the Attorney General to claim and for himself determine the question of privilege as to the documents called for in the motions to produce. Thereupon, after considering said cases, the Court stated from the Bench that to sustain this contention, would in effect, amount to an abdication of the Court's duty to decide the matter and leave it entirely in the hands of the Attorney General; that if the docu-

ments were submitted to the Court, with such claims as to privilege as the Attorney General desired to make, they would be considered and if it appeared, in the Court's judgment, that production of any part thereof would be injurious to public interest, they would be excluded; otherwise, the order to produce for the inspection of defendants would be sustained. This, having been declined, counsel was told that a reasonable time would be allowed for further consideration, and the latter, stating no additional time was desired, the Court announced that the only course left was to dismiss the complaint for failure to comply with its orders. All the motions by both sides, above enumerated, and the minutes of the Court, and notes of the court reporter are made part hereof.

It is therefore ordered, adjudged, and decreed that this cause be dismissed for the failure of plaintiff to comply with the Court's order to produce for its inspection the documents called for in the motions, so it could determine the question of privilege under the law.

Done and signed on this September 19th, 1949.

(S) BEN C. DAWKINS,
U. S. District Judge.

Filed September 20, 1949. Philip H. Mecom, Clerk, U. S. District Court, Western District of Louisiana.

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UNITED STATES DISTRICT COURT,
Western District of Louisiana.

This is to certify that the above and foregoing contained on this and preceding two pages is a true and correct copy of the original.

Sept. 26, 1949.

PHILIP H. MECOM,
Clerk.

By THOMAS W. THOMPSON,
Deputy Clerk.

In the United States District Court for the Western District of Louisiana, Shreveport Division

Civil Action No. 2209

UNITED STATES OF AMERICA
vs.
COTTON VALLEY OPERATORS COMMITTEE, THE OHIO OIL COMPANY, ET AL.

For Plaintiff: Tom C. Clark, Atty. Gen., Jno. F. Sonnett, Geo. B. Haddock, W. B. Watson Snyder, and Jas. R. Browning, Spl. & Assts. Atty. Genl.; Malcolm E. Lafargue, U. S. Attorney.

For Defendants: Jno. M. Madison; W. S. Wilkinson; Wilkinson, Lewis & Wilkinson; Jno. T. Gayton; J. R. Goff; and Sidney G. Meyers, all of Shreveport, La.; Vernon Roberts, Ada, Okla.

DAWKINS, Judge:

The general nature of the complaint in this case is described in the opinion filed herein on January 21, 1948. We now have for consideration three additional motions, to wit: (1) By some 20 odd defendants for a more definite statement of facts upon which the demand is founded; (2) By the Ohio Oil Co., for the production of certain documents; and (3) a motion to dismiss.

Taking these motions up in the order named (1) requests further information with respect to Articles 10, 11, 13, 14, 15 and 16 of the complaint.

The request as to paragraph 10 has been voluntarily answered by the complainant to the satisfaction of the defendants.

At the oral argument of this motion, after hearing both sides, the request as to Article 11 of the complaint consisting of paragraphs 2, 3, and 5, through 8, were denied from the Bench; while No. 4 had also been answered by complainant to the satisfaction of defendants.

As to Article 13 of the complaint referred to in paragraph 9 of the motion for particulars, the complainant is asked:

> What was the nature of any agreement (tacit or otherwise) between defendants herein (other than those agreements expressed and contained in the "Cotton Valley Unitization and Pressure Maintenance Agreement") to which it is claimed that this defendant was a party and when

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> and with whom such agreement or agreements made or by what acts or actions was such agreement or conspiracy made manifest?

Article 13 of the complaint alleges that:

> Said combination and conspiracy (to monopolize and restrain trade in the products of the field, other than what was reinjected for conservation and to increase production) has consisted of a continuing agreement and concert of action among defendants, the substance and terms of which were and are, defendants.

Then follows sub-paragraphs (a) through (d) charging that defendants did agree, while so engaged, "to exclude others" (a) from the business of extracting, processing, and refining various hydrocarbons; (b) from the business of distributing and selling said products; (c) to sell jointly through channels selected by themselves; and (d) to fix uniform prices, terms and conditions of sale, involving over 85 per cent of the "natural flow of liquid and gaseous hydrocarbons produced from the field and not reinjected therein."

The motion in paragraphs 9 through 15, both inclusive, requests that complainant (9) state the "nature of any agreements" with persons other than defendants, after unitization and pressure maintenance agreements, outside of and beyond the signed document approved by the Department of Conservation of the state, which

it is claimed defendants entered into, giving the names of the parties thereto besides themselves; (10) "by what means and in what manner * * * defendants undertook to exclude others" from any of such activities; (11) the nature of the business in which the defendants agreed to engage other than extracting and reinjecting the substances into the field, "Where the same was conducted; and at what point or in what manner or by what means could said operations be recognized or identified"; (12) the means and manner used to exclude others from the business of distributing and selling the products taken from the field; (13) nature of the agreement relating to sale and distribution, other than the sale of defendants' own products upon the open market, and with whom made; (14) through what channels did defendants agree to sell; with whom and how did such agreements arise, for how long did each continue, and how were such channels generally selected; (15) what were the prices, terms and conditions agreed upon and in what respects whose prices did not conform to those established and available upon the open market, as well as the persons and dates on which said agreements were made, etc.

As to paragraph 9 (Art. 13 of the complaint) the nature of the alleged agreement is described in general terms in said paragraphs 13 (a) through 13 (d) of the complaint, as having been between the large number of defendants charged,

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sufficiently, it is believed, to apprise them that it was to permit them to control the residue of production remaining after extracting and reinjecting certain elements into the field for the purpose of greater recoveries, including refining, distributing and selling at uniform prices agreed on between them and by excluding all others from any of these activities.

The details as to which of the defendants refined, distributed, shipped, marketed or sold these products and fixed the prices therefor, including the choosing of the channels of operations, to the exclusion of others, whether carried on through third persons or agencies or by the defendants themselves, involved matters of evidence or proof, it is believed, which did not have to be alleged. Defendants may have recourse to interrogatories under No. 33 of the Rules of Federal Procedure for any additional information to which they may be properly entitled.

Paragraph 16 of the motion deals with Article 14 of the complaint. This article charges as follows:

> 14. The continuing agreements, understandings and concerted action of the defendants set out in paragraphs 11 and 12 of this complaint do not contribute to the conservation of the oil and gas resources of the Field or of the State of Louisiana, or prevent the waste and depletion thereof. Said agreements, understandings and con-

certed action are not necessary, and do not contribute, to the separation of any of the liquid and gaseous hydrocarbons taken from the Field, nor to the reinjection of a residue of liquid and gaseous hydrocarbons under pressure into the natural reservoirs of the Field. Said agreements, understandings and concerted action are not authorized by Act Number 225 of the legislature of the State of Louisiana of 1936, Act Number 157 of the Legislature of the State of Louisiana of 1940, nor by Order Number 10–B, dated July 1, 1940, Order Number 10–C, dated January 28, 1941, nor any other order issued by the Commissioner of Conservation of the State of Louisiana.

Defendants asked "in what respects * * * it is claimed that * * * operations * * * by defendants did not contribute to conservation * * * or were not authorized by statute or order of the Commissioner of Conservation * * * and at what point in the course of such operations did defendants depart from conservation and administrative authority?"

It must be assumed, it would seem, that in the course of the investigation preceding the filing of the complaint, complainant determined the nature of the operation up to the point where permissible acts of conservation ended and the alleged illegal combination and conspiracy in restraint of trade and commerce began. In order to prevail, it will have to make proof of this sufficiently to

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enable the Court to draw the line and be able to say that "so far your conduct was proper, but beyond this, you began to violate the Sherman Act." The situation presented in this case is unique, in that the complaint as pointed out in the former opinion, set forth the background and history of operations in this field, which it says were proper acts of conservation, having the approval of the state agency, even though the defendants were acting in concert. It then proceeds to charge that certain other activities which were necessary to a realization of the profits or benefits in money from production were illegal. Extraction of the elements from the field production, by refining or otherwise, their transporting and marketing, were not illegal in themselves, but became so only when a point had been reached where the public or those desiring, could participate therein under the conditions which prevailed. Was it at the mouth of the well where the carbohydrons were withdrawn, at the tanks if storage existed in the field, or at some other point, if the residue had to be transported by pipe lines? It can easily be conceived that a single extraction plant or a refinery existed in the field or vicinity, which was also operated by defendants, who conceived and put into effect the measures of conservation. If so, did any situation arise that compelled them to construct pipe lines or otherwise provide means of transportation for the use of competing refineries or operators, or *can it be*

made to appear that there were already operating, facilities of competitors, who were denied the right to purchase those products at points available to the public? It is true that defendants must be familiar with conditions in the area, and no doubt have in their possession, records of whatever transactions took place; but charges such as those made in the complaint are quasi criminal, and as defendants' counsel say, if the Government prevails, may be taken advantage of by other private litigants to recover triple damages from these defendants. In fact, the Sherman Act is primarily criminal in its nature, but permits civil remedies, such as are sought here by the Government, to prevent its violation; and the character of the combination and conspiracy should be set forth with sufficient particularity to permit defense, if such exists. *Facts should be furnished to show when and where the illegal activity began and by what means competitors were excluded.*

If the defendants in this case were stockholders or officers in a single corporation, operating in the Cotton Valley Field, there would appear to be no reason why they could not acquire any part of the production, transport it in the crude state, by pipelines or otherwise, separate its constituent elements in the field, if facilities existed there, or carry it to refineries operated by themselves and then distribute and sell the finished product, as is done by most big companies throughout the country. On the other hand, if, because of

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the peculiar conditions, it was necessary that the owners of independent interests in the field should pool the same for the purpose of efficient and profitable recovery, under a system recognized and approved by proper authorities, a point might be reached where a continuation of that pooling of interest might become illegal, if it involved a substantial portion of production, to which the public had access before the necessity for conservation measures arose, and they were denied such rights through refusal of defendants to permit these competitors to participate, after the acts of conservation had been completed. There should be some allegation of fact as to just what was done to bring about a monopoly and the exclusion of competitors other than the legal conclusions that such monopoly existed and caused the exclusions.

Paragraph 16 (a) through 16 (d) of the complaint, under the heading "effects" alleges that the conduct of defendants "excluded other persons and companies from the business" (a) of extracting and processing the hydrocarbons, (b) from selling and marketing, (c) transporting and (d) refining and distributing the same.

Defendants asked that complainant be required to give the names and manner in which other persons were excluded from all the activities covered by these four subdivisions of the complaint.

Here again, the complaint should give a reasonable outline of the conditions in the field that (1) made the products available to public participation in their commerce, and (2) *the available facilities and outlets making competition possible such as refineries, pipelines, etc., which were excluded.* In all other respects the motion for particulars or further statement of facts will be denied.

THE MOTION OF OHIO OIL COMPANY TO PRODUCE CERTAIN DOCUMENTS

The issues presented by this motion are the same as were considered in an almost identical motion by the Magnolia Petroleum Co. in the opinion handed down on January 21, 1948. After further consideration the Court is of the view that this motion should likewise be denied for the reasons stated in that opinion.

MOTION TO DISMISS

The motion to dismiss is based on the contention that in pooling their interests in the Cotton Valley field, pursuant to the requirements of the state statute and orders of the Conservation authorities, the defendants became owners in indivision of the production under their control, with the right to make agreements for handling it to their mutual profit or benefit; further, that the nature of the substances produced and the only means for separating the constituent elements for marketing made impracticable, though

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not impossible, a division in kind at any given point prior to realization, without consequent loss or added expense. State decisions, as well as Federal cases are cited to the point, that there is no ownership in these fugacious minerals until brought to the surface and reduced to possession, but only a common right in the surface owners to explore therefor and bring about such possession; from which it follows that the state, under its police power, may regulate the same by requiring, pooling and sharing in production, to prevent economic waste and to insure each surface owner his fair share.

There is no question, that, in Louisiana, the nature of the right of surface owners in minerals is such that the state possesses and in recent years has exercised extensively its power of control and regulation by compelling landowners in many fields, where ownership was in small tracts, to pool their interests and to share in production through one or more wells for an entire block, according to acreage owned. In such situation, up to the point where the minerals pass into commerce, there exists a joint or common enterprise. Usually, the drilling or marketing is done by one or more lessees, who provide storage or access to pipelines, and the surface owners are paid in accordance with what are commonly called "division orders".

However, where, as alleged here, 85 percent of the producing area is leased to a number of

lessees and they, together with the surface owners, are compelled, by virtue of the said requirements of conservation to pool that percentage of a field of the size of Cotton Valley, a situation is created whereby it is made possible for such a group, if the product happens to be of premium quality, to monopolize the same and to demand high prices, so long as competition can be kept out. And the temptation to do so is increased by the extent of participation of the several interests in those profits; whereas, if competition in the purchase, refining and marketing were allowed to have free play, such premium production might be held to its fair value by those who were willing to take a reasonable profit instead of demanding all the traffic would stand.

In general terms this appears to be what the complaint intends to charge; although as stated in passing upon the motion for particulars or a more definite statement of facts, it has not been made clear just where the line of demarcation between conservation and the alleged monopolistic operations lies. Undoubtedly, if persons, such as are the defendants, according to the complaint, without compulsion for conservation, voluntarily entered into an agreement to pool 85 per cent of production in a field such as this, and to exclude from participation all others, through all steps to ultimate realization of the profits or benefits, which are the controlling reasons for all business

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enterprises, it could hardly be contended that such a course was not within the purview of the anti-trust laws. If this were permissible as to one field, no reason can be seen why it could not be extended to others, and thus bring about a condition similar to that which precipitated dissolution of the original Standard Oil Company years ago.

It is believed that when complainant shall have complied with the ruling for a definite statement of the cause of action, the issues of fact and law will appear sufficiently to warrant a trial on the merits.

The motion to dismiss will therefore be overruled.

Proper decree should be presented.

Thus Done and Signed in Chambers at Monroe, Louisiana, on the 21 day of April 1948.

(Signed) BEN C. DAWKINS,
United States District Judge.

In the United States District Court for the Western District of Louisiana, Shreveport Division

Civil Action No. 2209

UNITED STATES OF AMERICA

vs.

COTTON VALLEY OPERATORS COMMITTEE, THE OHIO OIL CO., ET AL.

For Plaintiff: Tom C. Clark, Atty. Gen., Jno. F. Bennett, Geo. B. Haddock, W. B. Watson

Snyder, and Jas. R. Browning, Spl. Assts. Atty. Gen., Washington, D. C.; Malcolm E. Lafargue, U. S. Atty., Shreveport, Louisiana.

For Defendants: Jno. M. Madison; W. S. Wilkinson; Wilkinson, Lewis & Wilkinson; Jno. T. Gayton, J. R. Goff, Sidney G. Meyers, all of Shreveport, La.; Vernon Roberts, Ada, Oklahoma.

ON MOTION TO QUASH SERVICE

DAWKINS, J:

After due consideration of the motion to quash service of process, made by J. J. Frommer on whom it was served for the Cotton Valley Operators' Committee, without finding it necessary to enter into an extended discussion of authorities, this Court is of the opinion that the same should be and it is accordingly overruled. See *United Mine Workers* vs. *Coronado Coal Co.*, 259 U. S. 344; *U. S.* vs. *Greater N. Y. Live Poultry Chamber of Commerce*, 30 Fed. (2d) 939; *Dowd* vs. *United Mine Workers*, 235 Fed. 1; *Sperry Products, Inc.* vs. *Assn. American Railroads*, 132 Fed. (2d) 408; *Hecht, Trustees* vs. *Malley*, 265 U. S. 144; and *Federal Rules of Civil Procedure*, 17 (b)).

Thus done and signed in Chambers at Monroe, Louisiana, on this the 12th day of March, 1948.

(s) BEN C. DAWKINS,
United States District Judge.

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In the United States District Court for the Western District of Louisiana, Shreveport Division

Civil Action No. 2209

UNITED STATES OF AMERICA

vs.

COTTON VALLEY OPERATORS COMMITTEE, THE OHIO OIL CO., ET AL.

For Plaintiff: Tom C. Clark, Atty. Gen., John F. Sonnett, Geo. B. Haddock, W. B. Watson Snyder, & Jas. R. Browning, Spl. & Assts. Atty. Gen., Washington, D. C.; Malcolm E. Lafargue, U. S. Attorney.

For Defendants: John M. Madison; W. S. Wilkinson; Wilkinson, Lewis & Wilkinson; Jno. T. Gayton, J. R. Goff, Sidney G. Meyers, all of Shreveport, La.; Vernon Roberts, Ada, Okla.

DAWKINS, J:

The Government brought this suit under the provisions of Section 4 of the Act of July 2, 1890, c. 647, 26 Stat. 209, commonly known as the Sherman Anti-Trust Law, charging some fifteen corporations and eighteen individuals, with conspiring to "restrain unreasonably and to monopolize trade and commerce in the liquid and gaseous carbohydrates" taken from the Cotton Valley Field of Webster Parish, as follows;

> Said combination and conspiracy has consisted of a continuing agreement and concert of action among the defendants the

substantial terms of which have been and are the defendants.

(a) Agree to jointly engage in and exclude others from the business of extracting, processing and refining various separate hydrocarbons and hydrocarbon products from over 85% of the natural flow of liquid and gaseous hydrocarbons produced from said Field and not reinjected therein, which said business of extracting, processing and refining was in addition to that required to separate said hydrocarbons from said natural flow or to reinject the residue thereof into the Field;

(b) Agree to jointly engage in and exclude others from the business of distributing and selling all of the hydrocarbons and hydrocarbon products jointly extracted, processed or refined by the defendants from over 85% of the natural flow of liquid and gaseous hydrocarbons produced from the Field and not reinjected therein.

(c) Agree to jointly sell through channels of distribution jointly selected by the defendants all of the hydrocarbons and hydrocarbon products extracted, processed or refined by the defendants from over 85% of the natural flow of liquid and gaseous hydrocarbons produced from the Field and not reinjected therein.

(d) Agree upon fixed and uniform prices and terms and conditions of sale for each of the hydrocarbons and hydrocarbon products extracted, processed or refined by the defendants from over 85% of the na-

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tural flow of liquid and gaseous hydrocarbons produced from the Field and not reinjected therein, and agree to sell each of said hydrocarbons and hydrocarbon products at the said fixed and uniform prices and upon said terms and conditions of sale.

The bill itself, under the heading "Background" enumerates the conditions prevailing in the field, which brought about the original joint action of the defendants as follows:

> The Cotton Valley Oil Field is located in Webster Parish in the State of Louisiana. Whenever the term "Field" is hereinafter used, it is intended to mean the said Cotton Valley Oil Field including the natural underground reservoirs in said Field in which hydrocarbons are present.
>
> The Field contains hydrocarbons in both liquid and gaseous forms. These hydrocarbons are under high pressure within the reservoirs, and in the exploitation of the Field this pressure is utilized to bring both the liquid and gaseous hydrocarbons to the surface of the ground. This flow of liquid and gaseous hydrocarbons as it reached the surface is sometimes hereinafter referred to as the "natural flow" from the Field. The greater part of the hydrocarbons in the Field are found at depths in excess of 8,000 feet. The ratio of gaseous to liquid hydrocarbons in the Field is in excess of 10,000 cubic feet of gas to one barrel of liquid. The cost of

producing liquid hydrocarbons from individual wells is high. Rights to produce hydrocarbons from the Field are owned by more than thirty individuals and corporations. The production of gaseous and liquid hydrocarbons from the Field without reinjecting a part thereof into the Field would result in the rapid reduction of the underground gas pressure necessary to the ultimate recovery of both liquid and gaseous hydrocarbons from the Field. It is economically impracticable for individual owners to reinject a part of the gaseous and liquid hydrocarbons into the Field.

In an effort to find a solution to these problems the producers in the Field erected an experimental injection station in 1939. From this experiment it was determined that certain of the liquid and gaseous hydrocarbons could be separated from the natural flow from the reservoirs and the residue could be returned to the reservoirs under pressure, permitting the exploitation of the Field without serious reduction of the pressure within the natural reservoirs. To accomplish this objective the producers of over half of all gaseous and liquid hydrocarbons from the Field entered into an agreement in the spring of 1940 which is known as the Cotton Valley Unitization and Pressure Maintenance Agreement, hereinafter referred to as "the Agreement". Thereafter other producers of hydrocarbons from the

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Field joined and became parties to the Agreement, and at the time of the filing of this complaint the parties thereto produced in excess of 90% of all hydrocarbons taken from the the Field. All of the defendants herein are parties to the Agreement or participated in activities related thereto. The purpose of the Agreement as set out in the preamble thereof is that "of more properly conserving the resources of said common oil, gas and other hydrocarbon field, pool or reservoir, and for the prevention of underground and surface waste." The Agreement provides for the unitization of liquid and gaseous hydrocarbons within a substantial part of the underground reservoirs of the Field and the pooling of lands containing these substances, for the production of these substances by a joint agency to be known as the Operators' Committee, and the apportionment of the substance so produced to the owners of individual rights in the area covered by the Agreement on an agreed upon basis. The Operators' Committee is authorized by the Agreement to exercise the sole right to drill in the area covered by the Agreement with certain limited exceptions, to enter into contracts for the extension of that area and to plan, coordinate and execute the development and operations within that area for unitized substances. As a part of this development the Operators' Committee is specifically authorized to construct and maintain a

modern recycling, pressure maintenance and liquid hydrocarbon extraction and processing plant. The Agreement stipulates that all unitized substances produced from the area covered by the Agreement, except such as may be used for production or development purposes or for repressuring or recycling, shall be apportioned among the owners and allocated on an acreage basis to the several tracts of land comprising such area except that the Operators' Committee shall be empowered to dispose of the gas produced for all owners.

Pursuant to power delegated by Act Number 225 of the Legislature of the State of Louisiana of 1936, and by Act Number 157 of the Legislature of the State of Louisiana, of 1940, the Commissioner of Conservation of the State of Louisiana issued Order Number 10–B, dated July 1, 1940, and Order Number 10–C, dated January 28, 1941, approving the Agreement only in so far as it provided for the unit operation and development of the area covered by the Agreement and the reinjection into the reservoir under pressure of a part of the liquid and gaseous hydrocarbons produced from said Field.

The results of the alleged acts in restraint of trade and commerce are listed under the heading "Effects".

The aforesaid combination and conspiracy and the acts and things done by defendants informing and effectuating said

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combination and conspiracy, were intended by the defendants to and have had the following effects:

(a) Excluded other persons and companies from the business of extracting, processing and refining various separate hydrocarbons and hydrocarbon products, from over 85% of the natural flow of liquid and gaseous hydrocarbons produced from the Field and not reinjected therein;

(b) Excluded persons and companies other than the defendants and those jointly selected by the defendants from an opportunity to engage in the business of selling and distributing liquid and gaseous hydrocarbons jointly produced by the defendants from said Field and the hydrocarbon products jointly processed, extracted or refined by the defendants therefrom;

(c) Excluded persons and companies other than the defendants and those jointly selected by the defendants from an opportunity to engage in the business of transporting liquid and gaseous hydrocarbons jointly produced by the defendants from said Field and the hydrocarbon products jointly processed, extracted or refined by the defendants therefrom; and

(d) Eliminated competition among the defendants, and between the defendants and others, in the extraction, processing and refining, in the transportation, in the distribution, and in the sale of hydrocarbon products extracted from over 85% of the natural flow of liquid and gaseous hydro-

carbons produced from the Field and not reinjected therein.

The bill was filed on June 17, 1947. Numerous motions were presented by various defendants, and on October 22, 1947, the Government filed a motion to "strike or limit" defendant, Magnolia Petroleum Company's application to take oral depositions. Up to that time there was no record in this court of said Company's effort to take such depositions for the process had been gotten out in the Eastern and Southern Districts of Texas. Attached to the motion to strike were copies of notices, addressed to the Attorney General and some four of his assistants, to the United States Attorney of this district, and to the numerous attorneys representing the corporations and individuals, that the depositions would be taken as follows: On October 27, 1947, Tom Clark, Attorney General, Malcolm E. Lafargue, United States Attorney for this district, Myron Blalock and Jack Blalock of Marshall, Texas, and L. G. Dufilho of Shreveport, in the State Court House at Marshall, Texas; on October 28th, depositions of Sylvester Dayson (or Dyson), president of Premier Oil Refining Co. of Longview, Texas, and J. Zeppa of Tyler in the state courthouse of Tyler, Texas; and on October 29th, J. R. Parten, president Woodley Petroleum Co., Marlin Sandlin, Myron Blalock and Jack Blalock of Houston, Texas, in the state courthouse in that city.

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There was also attached to said motions to strike, of the plaintiff, subpoenas ducem tecum, or to produce, addressed to the Attorney General and to the said U. S. Attorney of this district, as follows: to Tom Clark, Attorney General, demanding that he produce at Marshall, Texas, at the time of giving his deposition on October 27, 1947, documents and records as set forth in the footnote below;[3] to Malcolm E. Lafargue, United States Attorney, documents and records as shown in footnote.[4]

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[3] "All letters, telegrams, and other communications of every kind or copies thereof (together with copies of replies thereto) received by the Department of Justice of the United States (during the period extending from August 1, 1945, to the date of institution of this action) from private individuals, corporations or associations (including parties to this action) relating to methods of operations conducted by defendant, Magnolia Petroleum Company, or any other defendant herein, alone or in association with other defendants (or any number thereof) in or in connection with the production, processing and manufacturing of liquid and gaseous hydrocarbons produced from the Cotton Valley Field of Webster Parish."

[4] "All letters, telegrams, and other communications of every kind thereof (together with copies of replies thereto) received by the Department of Justice of the United States (during the period extending from August 1, 1945, to the date of institution of this action) from private individuals, corporations or associations (including parties to this action) relating to methods of operation conducted by defendant, Magnolia Petroleum Company, or any other defendant herein, alone or in association with other defendants (or any number thereof) in or in connection with the production, processing and manufacturing of liquid and gaseous hydrocarbons produced from the Cotton Valley Field of Webster Parish."

The grounds of the motion to strike or limit were as follows:

1. Said Notice was filed by defendant Magnolia Petroleum Company before answer without first obtaining leave of this Court.

2. Said Notice seeks to require the attendance of nonresidents of the district in which the depositions are to be taken in a county other than that in which served and at a place more than 40 miles from the place of service without an order of the Court.

3. The depositions to be taken pursuant to said Notice could not serve either the purpose of discovery or as evidence in the above entitled action.

4. The examination contemplated by said Notice would relate to matters which are privileged and which are not relevant to the subject matter involved in the above entitled action.

5. The examination contemplated by said Notice would relate to information obtained by the attorneys and agents of the Plaintiff in anticipation of litigation and in preparation for trial, and the mental impressions, conclusions, opinions and legal theories of said attorneys, and no showing has been made that denial of disclosure concerning said matters will unfairly prejudice the defendant Magnolia Petroleum Company or cause said defendant undue hardship or injustice.

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6. The taking of depositions contemplated by said Notice would cause unreasonable annoyance, embarrassment and oppression to the Plaintiff and to the witnesses.

7. Said Notice seeks to require the attendance of Tom C. Clark, Attorney General of the United States, at a place remote from his duties at the seat of Federal Government, in Washington, D. C., to submit to examination in a preliminary hearing relating to matters of State and of a confidential nature and not relevant to the subject matter involved in the above entitled case, without any showing as to the possible materiality of the testimony of said Tom C. Clark. That said Notice is therefore unduly oppressive and harassing, is contrary to the public interest, and is against public order.

8. Said Notice seeks to require the attendance of Malcolm E. Lafargue, United States Attorney, Western District of Louisiana, at a place remote from his office and duties at Shreveport, Louisiana, to submit to examination in a preliminary hearing relating to matters concerning which he has no personal knowledge, without any showing as to the possible materiality of his testimony. That said Notice is therefore unduly oppressive and harassing, is contrary to the public interest, and is against public policy.

9. That the examination contemplated by said Notice would relate to matters the

disclosure of which is prohibited by Department of Justice Order Number 3229, issued pursuant to the authority of Revised Statute 161, 5 U. S. C. 22.

(1) The motion to strike might be disposed of by a simple reference to Rule 26 (a) of the Rules of Civil Procedure, which allows the taking of depositions before issue joined, before the filing of an answer "by leave of the court" in which the suit is pending. No application was made to or granted by this court for the taking of said depositions. See Application of Wisconsin Alumni Research Foundation (D. C. N. Y. 1945) 4 F. R. D. 462; Deskin vs. Zinker, 6 F. R. D. 615. (Amendment to this rule has been made authorizing taking of depositions without permission of the court before issue joined but the Attorney General has given an opinion that it will not become effective until March 1948.) However, since the taking of the depositions was stayed by this court and the dates therefor have long since passed, it is thought proper for the guidance of the parties in the future, that the Court should rule upon the issues raised by the motion to strike.

(2) As to the notice to the Attorney General and his assistants, the court may take cognizance of the fact that his official duties are performed in Washington, D. C. many times the distance of 40 miles, within which a witness may be required to appear, and these witnesses can not be made to respond. Rule 45 (d) (2).

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As to the United States Attorney, Shreveport is some 37 miles from Marshall, Texas. The rule just cited provides that "a resident of the district in which a deposition is to be taken may be required to attend, etc. A non-resident of the district (in which the deposition is to be taken) may be required to attend * * * within 40 miles of the place of service, or at such other place as may be fixed by the court." In this instance there was no place fixed by the court, for the reason no order for the taking of the deposition of the District Attorney was obtained, but if the right to take it had existed at the time, without this order, then he was within the range which permitted him to be summoned to Marshall, Texas, since he was "a non-resident of the district" in which the deposition was to be taken.

(3) The third point of the motion to strike, that the "depositions could not serve the purpose of discovery or as evidence" involves much of what is raised in Nos. 4 and 5.

In response to the motion to strike, Magnolia Petroleum Co., at whose instance the notice to take the depositions was issued, has answered, stating in substance what it expected to prove thereby (a) that the suit of the Government was not filed in good faith, (b) that the United States is only a nominal party and the real plaintiff, not named in the case, is the Premier Oil Refining Company of Texas, "its president, officers, directors and stockholders", (c) that it was filed to pay

a political debt of the present national administration, (d) its purpose is to further the final interest of the said corporation, its officers and stockholders, (e) for which reasons the Plaintiff and the Attorney General come into court with "unclean hands", (f) that the purpose is to permit or foster a monopoly on behalf of said corporation in the Cotton Valley field, (g) that plaintiffs are using Woodley Petroleum Co., a subsidiary of the Premier Oil Refining Co., whose officers and stockholders are largely common to those of the former, as a nominal defendant to have it enter "a sort of plea of guilty and thereby 'run interference' for the plaintiff and the said Premier Oil Refining Co., to help it achieve a monopoly over distillate from the Cotton Valley Oil field or to insure a future treble damage suit for" it and plaintiff. The three succeeding paragraphs (h), (i) and (j) are largely elaborations of the preceding ones; (k) denies that the communications between the Attorney General and the persons named are confidential, (l) that the information sought would enable the Court to understand the "background" of the suit to enable it to balance equities, (m) unless it, Magnolia Petroleum Company is permitted access to the information thus sought, it would be "deprived of its day in court" and be denied due process of law. Paragraphs (n) and (o) are also elaborations of matters covered by preceding numbers.

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Rule 26 provides (a) for the taking of oral depositions "for the purpose of discovery or for use as evidence in the action or for both purposes * * * in accordance with these rules * * *;" (b) * * * regarding any matter, not privileged, which is relevant to the subject matter involved * * * in the pending action * * *.

Defendant, Magnolia Petroleum Company (called Magnolia) charges that the suit was not filed in good faith, not because it does not state a cause of action under the Sherman Anti-Trust Act, but because, as this defendant alleges, action was induced by political considerations and to pay a political debt to the Premier Refining Co. (called Premier), not made a party. It would seem sufficient to say that, if the complaint alleges facts, which, under the law, would entitle the plaintiff to relief, and this were substantially proven, the Court could not decline to award judgment even though it might have been inspired in the manner charged. Suppose, on final hearing it should be shown that defendants had violated the anti-trust statute to the extent and in the manner charged and Magnolia was able to show that the Attorney General, his assistants and the United States Attorney had acted at the instance of Premier for the reasons which Magnolia alleges, then this could not thwart a lawful result.

It is the conclusion that the matters charged in paragraphs (a) to (f) inclusive, show that the

testimony sought from the Attorney General and the United States Attorney is irrelevant.

As to the charge (h) that Woodley Petroleum Company (called Woodley) was made party defendant for the purposes stated, when in reality its interest was the same as Premier, if it should be found at the trial that the former is not a bona fide defendant, the bill as to it should be dismissed, and otherwise what has been said as to the preceding paragraphs applies in this instance.

With respect to the charge (i) that for the reasons alleged in the preceding paragraphs the plaintiff (United States) comes into court with "unclean hands", it is believed that this principle should be confined to matters wherein the party so charged was guilty of some act or acts which were similar to those complained of or attributed to the defendants, or that complainant had committed others of a nature such that good conscience with respect to the subject matter would not permit the complainant to be heard. The answer in no sense charges that these Government officers have participated in acts involving the merits of the matter, which would deprive the Government of its right to insist that the defendants be held to account for their alleged wrongdoing. A simple illustration, it is thought will serve to show the irrelevancy of these charges. Should the National Administration change be-

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tween now and the trial of this case on the merits, and the new Attorney General should determine to go forward with it, no one could seriously contend that the alleged conduct of the present officers could serve to prevent that course. Then, too, fundamentally, officers of the United States can not bind it either adversely or favorably by action intended to serve their personal ends. Its right to proceed and to have relief according to the facts proven under the complaint can not be diminished by the conduct of its agents. These observations apply equally to paragraphs (j) to (o) inclusive.

From what has been said it follows that the subpoenas ducem tecum should be recalled and quashed.

MOTIONS FOR MORE DEFINITE STATEMENT OF FACTS

Motions for more definite statement of facts have been filed by a number of defendants. Counsel for one or more of these have asked and will be granted further hearing thereon, and until this has been done, said motions will not be disposed of.

This course will also be pursued as to the exceptions that the complaint fails to state facts upon which relief can be granted. After the motions for more definite statements are out of the way, it will be time to determine whether the bill alleges a cause of action.

Proper decree should be presented.

Thus done and signed in Chambers at New Orleans, Louisiana, on this, the 21 day of January, 1948.

(S) BEN C. DAWKINS,
United States District Judge.

U. S. GOVERNMENT PRINTING OFFICE: 1949